

# Agenda Item 3



County Council

## Open Report on behalf of Andy Gutherson, Executive Director - Place

Report to:	<b>County Council</b>
Date:	<b>03 August 2020</b>
Subject:	<b>Pavement Licences - Delegation of District Council Functions</b>

### **Summary:**

This Report seeks approval from the County Council to accept delegations from District Councils in Lincolnshire of their pavement licensing functions under Part 1 of the Business and Planning Act 2020.

### **Recommendation(s):**

That the Council:-

- 1) approves the exercise by the Council of the pavement licencing functions contained in Part 1 of the Business and Planning Act 2020 if and to the extent that they are delegated to the County Council by any of the District Councils in Lincolnshire
- 2) delegates to the Executive Director - Place the authority to take all decisions necessary to fulfil the said functions including the determination of applications for pavement licences

### **1. Background**

#### **The Legal Context**

The Business and Planning Act 2020 ("the Act") became law on 22 July 2020.

Part 1 of the Act contains a fast track licensing process for authorising the placing of removable furniture on the highway adjacent to premises

The Act applies where a person is using or proposing to use premises as a public house, wine bar or other drinking establishment or otherwise for the sale of food or drink for consumption on or off the premises.

The licence permits the licence-holder to put removable furniture on the highway for either or both of the following purposes:-

- selling or serving food or drink supplied from the premises;
- use of the furniture by other persons for the purpose of consuming food or drink supplied from, or in connection with relevant use of, the premises.

On receipt of an application the local authority must undertake a 7 day public consultation, consult the local highway authority and consult such other persons as they consider appropriate.

The authority must determine the application within 7 days after the end of the 7 day public consultation period – i.e. within 14 days after the application was first made. If the authority does not determine the application within that period the licence is deemed to be granted.

A local authority may grant a pavement licence only if the authority considers that nothing done by the licence-holder pursuant to the licence would prevent:

- non-vehicular traffic or permitted vehicular traffic, from entering the highway, passing along the highway, or having normal access to premises adjoining the highway, or
- statutory undertakers or electronic communications code network operators having access to any apparatus of theirs under, in, on or over the highway.

In addition the council can make the above prohibitions a condition of the licence (known as a "no obstruction condition").

The authority can specify the duration of a licence granted under the Act but that duration cannot be less than three months and cannot extend beyond 30 September 2021. Where a licence is deemed to be granted as a result of an application not being determined within the time limit set out in the Act, the licence lasts until 30 September 2021.

The licence can be granted on such conditions as the authority considers appropriate.

However, regardless of whether the Council were to include such a condition or not, every licence is deemed to be subject to the "no obstruction condition" as defined above and a "smoke-free seating condition".

A "smoke-free seating condition" is a condition that, where the furniture to be put on the highway consists of seating for use by persons for the purpose of consuming food or drink, the licence-holder must make reasonable provision for seating where smoking is not permitted.

The local authority by which a pavement licence is granted or deemed to be granted may revoke the licence on a number of grounds including if it considers that:

- the licence-holder has breached any condition of the licence,

- some or all of the part of the highway to which the licence relates has become unsuitable for any purpose in relation to which the licence was granted or deemed to be granted, or
- as a result of the licence there is a risk to public health or safety, anti-social behaviour or public nuisance is being caused or risks being caused, or the highway is being obstructed (other than by anything done by the licence-holder pursuant to the licence).

## **The Issue**

The Act places the function of administering and determining pavement licence applications on District Councils in a two tier area.

This is a function that the District Councils are not resourced for and do not have the existing administrative infrastructure to administer. The County Council, on the other hand, already licences the placing of removable furniture on the highway under pre-existing powers contained in Part 7A and particularly section 115E of the Highways Act 1980.

Although the County Council's Highways Act powers will continue to exist the new Act confers an entitlement on businesses to apply for a licence and places strict timelines on the local authority to respond. Under the Act an application must be determined within 14 days. Under the Highways Act the Council must give not less than 28 days' public notice during which representations may be made. The new Act also simplifies the process involved in applying for such a licence by providing for the licence to be deemed planning permission for the use and by taking the use out of the remit of the Street Trading legislation.

It is likely, therefore to become the main means by which businesses seek licences to place furniture for food and drink on the highway and is designed to be used quickly to enable such businesses to respond quickly to the loosening of restrictions relating to coronavirus.

## **The Proposal**

The County Council already has the administrative infrastructure to manage a pavement licensing application process and as the highway authority it is well placed to call on the expertise necessary to form the required judgments as to whether the licence should be granted.

The Council has therefore offered to administer and a number of the District Councils have expressed an interest in the County Council administering this process on their behalf. This may take one of two forms.

In the first kind of arrangement the Council would administer the process but the final decision would sit with the District Council. This would require the County Council to undertake the required consultation, compile the responses and provide it to the District Councils in order to form a judgment as to whether the licence

should be granted. This is an inefficient process which introduces an unnecessary step into what is already a very tight timescale.

The alternative arrangement is for the District Councils to delegate their functions under Part 1 of the Act to the County Council so that the County Council would not only administer the function but would become in law the decision-maker. This is the arrangement which is proposed in this Report.

## **The Decision**

Under the Act the function of issuing pavement licences under Part 1 cannot be exercised by the executive. Consequently under the law relating to delegation of local authority functions the delegation is required to be made under s101 of the Local Government Act 1972. The availability of this power of delegation is referred to in the Guidance accompanying the new Act and it is explicitly stated that it may be used to authorise the county council to exercise the functions in a two tier area.

However, since the functions will be non-executive functions and therefore exercisable by the Council as a whole the Council's Constitution requires full Council to approve accepting a delegation from the District Councils. The first recommendation seeks that approval.

The second recommendation recognises that the restricted timeframes for decision-making require final decisions to be taken by officers and therefore seeks a delegation to the Executive Director – Place to take the final decisions whether to grant a licence. Other decisions such as the conditions attaching to any licence would also be determined by the Executive Director – Place under this delegation.

This approach is supported by the District Councils in Lincolnshire a number of which including East Lindsey District Council, North Kesteven District Council, South Holland District Council and West Lindsey District Council have indicated their intention to delegate their functions. The first recommendation is worded in such a way that any of the Lincolnshire District Councils could delegate their functions at any time should they decide to do so.

## **2. Legal Issues:**

### Equality Act 2010

Under section 149 of the Equality Act 2010, the Council must, in the exercise of its functions, have due regard to the need to:

- \* Eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under the Act
- \* Advance equality of opportunity between persons who share a relevant protected characteristic and persons who do not share it
- \* Foster good relations between persons who share a relevant protected characteristic and persons who do not share it.

The relevant protected characteristics are age; disability; gender reassignment; pregnancy and maternity; race; religion or belief; sex; and sexual orientation

Having due regard to the need to advance equality of opportunity involves having due regard, in particular, to the need to:

- \* Remove or minimise disadvantages suffered by persons who share a relevant protected characteristic that are connected to that characteristic
- \* Take steps to meet the needs of persons who share a relevant protected characteristic that are different from the needs of persons who do not share it
- \* Encourage persons who share a relevant protected characteristic to participate in public life or in any other activity in which participation by such persons is disproportionately low

The steps involved in meeting the needs of disabled persons that are different from the needs of persons who are not disabled include, in particular, steps to take account of disabled persons' disabilities

Having due regard to the need to foster good relations between persons who share a relevant protected characteristic and persons who do not share it involves having due regard, in particular, to the need to tackle prejudice, and promote understanding

Compliance with the duties in section 149 may involve treating some persons more favourably than others

The duty cannot be delegated and must be discharged by the decision-maker. To discharge the statutory duty the decision-maker must analyse all the relevant material with the specific statutory obligations in mind. If a risk of adverse impact is identified consideration must be given to measures to avoid that impact as part of the decision making process

The licensing regime is open to any applicant regardless of protected characteristics.

The presence of street furniture in the highway has the potential to impact disproportionately on older people and people with a disability including those with impaired vision. The needs of people with a disability will be taken into account in determining what conditions to place on a licence having regard to paragraph 4.1 of the Guidance which sets out a range of matters to be taken into account in placing conditions on licences to ensure that the authority considers the needs of people with a disability.

The needs of people with a protected characteristic will also be taken into account in determining individual applications.

#### Joint Strategic Needs Analysis (JSNA) and the Joint Health and Wellbeing Strategy (JHWS)

The Council must have regard to the Joint Strategic Needs Assessment (JSNA) and the Joint Health & Well Being Strategy (JHWS) in coming to a decision.

The powers granted by the Act form part of the response to the economic impacts of coronavirus. They are intended to enable businesses to respond quickly to the easing of restrictions and expand their capacity to provide food and drink by opening up outdoor spaces.

Such a development may be seen as contributing not just to economic wellbeing but also to improvements in mental wellbeing which are associated with an increased return to normality.

### Crime and Disorder

Under section 17 of the Crime and Disorder Act 1998, the Council must exercise its various functions with due regard to the likely effect of the exercise of those functions on, and the need to do all that it reasonably can to prevent crime and disorder in its area (including anti-social and other behaviour adversely affecting the local environment), the misuse of drugs, alcohol and other substances in its area and re-offending in its area.

The Act recognises the potential for licencing of furniture on the highway to lead to anti-social behaviour. Any anti-social behaviour associated with specific premises would be a ground for revoking a licence.

### **3. Conclusion**

The Business and Planning Act 2020 introduces a streamlined process by which businesses can apply for licences to place removable furniture onto the highway for the purpose of serving and people consuming food and drink.

It makes administrative sense for the County Council to administer this licensing process alongside its existing licence arrangements under the Highways Act 1980. It is therefore proposed that the Council accepts a delegation of function from any District Councils who wish to do so. This would mean that the County Council would be legally entitled to administer the entire process from application through to final decision.

Full Council must approve the acceptance of such a delegation and this Report invites them to do so together with a delegation to support timely administration and decision-making

### **4. Legal Comments:**

The Council has the power to accept the delegation being proposed.

The decision to accept such a delegation from another local authority is reserved to the full Council.

### **5. Resource Comments:**

Agreeing to the recommendation within the report, should have no material impact on the budgets of the Council as we do not anticipate any additional costs or income in administering this function.

## **6. Consultation**

**a) Has Local Member Been Consulted?**

N/A

**b) Has Executive Councillor Been Consulted?**

Yes

**c) Scrutiny Comments**

Not Applicable

**d) Have Risks and Impact Analysis been carried out??**

Yes

**e) Risks and Impact Analysis**

See the body of the Report

## **7. Background Papers**

Document title	Where the document can be viewed
Business and Planning Act 2020	Legal Services
Buisness and Planning Guidance Act	<a href="https://www.gov.uk/government/publications/pavement-licences-draft-guidance/draft-guidance-pavement-licences-outdoor-seating-proposal">https://www.gov.uk/government/publications/pavement-licences-draft-guidance/draft-guidance-pavement-licences-outdoor-seating-proposal</a>

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